SUPREME COURT, U. S.

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No. 1288

In the

Supreme Court of the United States

OCTOBER TERM, 1969

TEX TAN WELHAUSEN COMPANY AND TEX TAN WESTERN LEATHER COMPANY, DIVISION OF TANDY CORPORATION,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Intervenor-Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO In Opposition

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Opinions Below

The Decision and Order of the National Labor Relations Board is reported at 172 NLRB No. 93 (See Pet.App.,[1] A12-A17f).

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 419 F. 2d 1265, Pet.App., A-1 to A-11).

[1] "Pet. App." refers to the Appendices of Petitioner's Application for Writ of Certiorari.

Jurisdiction

We acknowledge jurisdiction. Requisites of jurisdiction are adequately set forth in the first paragraph on page 2 of the Petition.*

Questions Presented

Petitioner's attempt to pose eleven questions actually presents various facets of only two questions,* which might be more properly stated:

One

Are NLRB's credibility determinations, fact findings and conclusions that petitioner-employer did not engage in good faith collective bargaining as required by §8(a)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §158 (a)(5) supported by substantial evidence?

Two

Where an important aspect of employer's failure to bargain related to employer's insistence upon unilateral control of wages, i.e. piece-rate standards, may NLRB specifically require bargaining thereon; and in aid thereof, require employer (1) to furnish copies of job descriptions, necessary to

* There is no record basis for the assertions in the succeeding paragraph—nevertheless we concede jurisdiction.

* The claim of "arbitrary award of vacation pay to strikers" is frivolous. The Board merely held, and the Court confirmed, that discrimination in refusal of vacation pay to those who had engaged in a strike aimed at correcting employer's unfair labor practices was itself unlawful. *See NLRB v. Great Dane Trailers Co.*, 388 U.S. 26.

The "*General Electric* rule," which plaintiff claims conflicts, did not involve unfair labor practice strikers.

evaluating and setting piece-rates; and (2) to cease conditioning all bargaining on agreement that employer may unilaterally control piece rates; and (3) to incorporate into a written contract with the union whatever agreement is reached as to productivity speed ratings upon the basis of which production standards for piecework are to be established?

Statute Involved

Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §158(a)(5) and 158(d) define the duty to bargain, viz:

> "It shall be an unfair labor practice for an employer— . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a). . . .
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

Section 10(a) and (c), 29 U.S.C. §160 empower the Board to issue remedial Orders, viz:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

Statement of the Case

A.

This is a conventional failure to bargain case. Employer met and went through the motions in a series of meetings as disclosed in a seven-volume, three thousand five hundred page record. But as the Board* and the Court of Appeals found upon careful review of this "mammoth record" (Pet. App. A4, 5; 419 F. 2d 1265 at 1268-1269):

> ". . . there is ample evidence in the record to sustain the Trial Examiner's finding that Tex Tan did refuse to bargain in good faith re-

* Pet. App. A25-A95.

garding the piecework standards and grievances, and that its overall approach to bargaining was not indicative of a good faith attempt to reach contract terms.

"The Company asserts in its defense that there was no refusal to bargain and that the Trial Examiner found it guilty because he did not like the manner in which it bargained, the order in which subjects were discussed, its failure to make concessions, and its overall bargaining strategy. *The evidence, however, does not support these contentions.* (Emphasis added) The Trial Examiner noted that he did not intend by the enumerations of the examples of Tex Tan's behavior to 'indicate that each such action or nonaction by itself, would in all circumstances show bad faith.' Rather, he noted that 'an overall appraisal of Tex-Tan's bargaining compels the conclusion that it did not approach the negotiations "with an open mind and purpose to reach an agreement consistent with the respective rights of the parties".' The record unquestionably supports the Trial Examiner's conclusion. It is true as the Company asserts that it continued to conduct many prolonged negotiating sessions. It is also true that the employer's mere refusal to concede during contract negotiations is not in itself a refusal to bargain. (citing cases) However, the record demonstrates that during these sessions Tex Tan was really engaged in what this court has termed mere 'shadow boxing to a draw.' (citing cases). In fact we detect an air of filibustering from the inception of negotiations through the administrative moils. Obduracy and obstinancy

> may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them sanction or refuge. Procrastination and negativity are not components of negotiation. (citing cases) The Act requires more than pretense. 'There is a duty on both sides, though difficult of legal enforcement, to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement.' (citing cases) While the Act does not require bargaining table surrender, it does require good faith discussions. Tex Tan breached this duty and was, therefore, guilty of an unfair labor practice. (citing cases)".

ARGUMENT

A.

The Petition Presents Fact Issues

Petitioner's assertions that these findings and conclusions "have no support in the record" (Petition, pp. 10-11), are significantly without record references. At best, Petitioner appears to be requesting this Court to search a mammoth record to find some basis to overturn findings made by the agency, and confirmed by the Court of Appeals. Factual review is for the Courts of Appeals — not for the Supreme Court.

B.

The Remedy is Appropriate

Petitioner's redundant assertion that the Board

is attempting to write the collective bargaining contract for the parties (Pet. 4, 8-10, 12-13; Supplement to Petition, 2-3) is not supported by the record. The Board's Order does not require agreement to any substantive terms of a collective bargaining contract.[5]

We have seen that Petitioner refused to bargain in good faith, and that the refusal was evidenced, in part, by petitioner's adamance that it remain free to control unilaterally the piecework standards, that employees forego their statutory privilege[6] to present grievances regarding piece rates, and that employer would not furnish job descriptions which are the necessary foundation on which any piece work wage schedule is based.

The Board, consistent with its statutory obligation "to prevent any person from engaging in any

[5] The requirement, Order 1(c), enjoining refusal to incorporate into a written contract its agreement as to productivity, etc., is not a requirement for execution of the terms of the agreement. For employer had stated oral agreement as to this matter, but had refused to reduce it to writing or sign it. See Pet. App. A 13[illegible] at 132.

This is thus not a Porter order to agree on a rejected clause; rather, it is an *H. J. Heinz* [illegible] order to reduce to writing and sign that which was already agreed upon orally.

[6] See 29 U.S.C. [illegible], first proviso, viz:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer* and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect . . . (Emphasis added)

unfair labor practice . . ." (29 U.S.C. §10(a)), and its power to order ". . . such affirmative action . . . as will effectuate the policies of this Act . . ." (29 U.S.C. §10(c)), specifically tailored the remedy to the violation found. Accordingly, it required petitioner to cease conditioning bargaining on employees' agreement to employer's unilateral control of piece rates, required the employer to furnish the union job descriptions necessary to piece rate computation; and specified that employer must bargain with respect to "wages, hours of employment and other terms and conditions of employment, including a definition or guiding principle to govern productivity speed ratings for piece work standards, and embody *any understanding reached* in a signed contract." Pet.App. A166ff., at 169 (emphasis added).

The Order does not require agreement to a substantive term of a collective bargaining agreement. Instead it requires bargaining about matters as to which employer had insisted upon unilateral control — and it specifies what those areas are.

Such order is absolutely necessary to meaningful bargaining. Parties may talk, shuffle papers, and trade "proposals" *ad infinitum*; but piece rate provisions in a contract are so many words of no meaning unless tied to a definition or baseline to govern productivity speed ratings for piece work standards. If the employer may apply some unknown — or variable — base he continues wholly unilateral setting of piece rates — and this means

wages are set, and varied at the employer's whim.

If employees are entitled to require an employer to bargain — and to reduce agreements to writing — they are entitled to more than words and exchange of papers. They are entitled to specification (in piece rate situations) of the bases upon which their wages are computed.

That is all the Board here requires.

The parties are left free to agree to such base as they may evolve from collective bargaining. And employer is foreclosed from refusing to bargain about that base. But unless the employer does bargain about, and upon agreement, include the base in the contract, the employer continues to maintain unbridled unilateral control of that which the statute says is subject to bi-lateral bargaining.

So viewed, it appears that the Board has carefully tailored a remedy designed to require bargaining on the basic matter of wages — yet in accordance with the scheme of the Act, has left to the parties the substance of that bargain.

So we see that petitioner's fears that the government will make the parties' bargain have no foundation in this case. This is not a *Porter* case — where this Court held that the Board had ordered an employer to agree to a substantive term of a collective bargaining agreement. *Porter Co. v. NLRB*, ... U/S. ....., ... L. Ed 2d ....., (March 2, 1970).

Rather, it is not unlike *General Electric* in which, on the very day *Porter* was decided, this Court denied certiorari, ... U.S. ..... (March 2, 1970). Here, as in *General Electric,* the Board and the reviewing Court have found facts as disclosed by enormous records, have determined that there was a failure of the good faith bargaining which the Act requires, and have approved orders designed only to remedy the derelictions with regard to bargaining — but to leave the parties free as to the substance of the bargain.

This is the function of the Board, and the reviewing Courts of Appeals. It presents no question for the Supreme Court. If it did, the record overwhelmingly demonstrates that petitioner refused to bargain, and that the remedy applied is appropriate to the violation found.

Accordingly, the petition for certiorari should be denied.

Respectfully,

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By .....

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April 1, 1970.